No. 12183

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS, ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLEE'S REPLY BRIEF.

SYLVAN Y. ALLEN,
502 Stock Exchange Building, Los Angeles 14.

J. D. WILLARD,
823 Chapman Building, Los Angeles 14,

ERNEST R. UTLEY,
633 Subway Terminal Building, Los Angeles 13,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles, Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 12183

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS, ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLEE'S REPLY BRIEF.

This is an appeal by the petitioning creditors in the above entitled bankruptcy proceeding "from the final judgment entered in this action on September 30, 1948, and from the order and judgment denying motion of petitioning creditors for a new trial, entered on October 25, 1948. [Tr. of Record pp. 115-116.]

Statement of Case.

This bankruptcy proceeding was begun by the filing of an involuntary petition in bankruptcy by appellants herein on September 26, 1947. [Tr. of Record pp. 2-8.] Appellee Wilbert C. Hamilton filed his answer thereto on October 2, 1947, denying, among other things, that he was a partner with Willard E. Brunson and Deon Bunch, or either of them, or that he was ever engaged as a copartner with either of said persons under the firm name of Brunson & Bunch or otherwise; denying that he was insolvent; denying that he was indebted to any of the petitioning creditors; and further, that any of said petitioning creditors had claims fixed as to liability and liquidated as to amount against him. [Tr. of Record pp. 10-19, incl.]

Thereafter, an amended involuntary petition was filed by appellants [Tr. of Record pp. 21-31, incl.] and appellee answered said amended involuntary petition in bankruptcy raising the same issues as hereinbefore mentioned. [Tr. of Record pp. 32-38, incl., and pp. 38-48, incl.]

The case was tried before the Court on June 29th and 30th, July 1st, September 7th, 8th and 9th, 1948. [See Findings, Tr. of Record p. 77.]

The Court filed its Memorandum Decision on September 14, 1948 [Tr. of Record pp. 121-124], and thereafter and on September 30, 1948, Findings of Fact and Conclusions of Law and Judgment were signed and filed in favor of appellee. [Tr. of Record pp. 77-86, incl.]

Record on Appeal.

In taking this appeal, appellants have not seen fit to favor this Honorable Court with a transcript of the testimony taken at the trial, which consumed a period of six days, but apparently are content to only furnish this Honorable Court with a portion of the pleadings filed in said case, together with some of the comments made by the Court during the course of the trial and a portion of the testimony of Dr. Raymond E. Donahey [Tr. of Record pp. 153-157], one of the several witnesses who appeared and testified at the trial.

Points Raised by Appellants on Appeal.

Appellants contend that the Court erred:

1. In excluding certain evidence which tended to show fraudulent misrepresentations and a general fraudulent plan and scheme offered to establish the fact that appellee was a partner of Brunson & Bunch.

2. In finding that appellee Wilbert C. Hamilton is not indebted to petitioning creditors or any of them, in any amount whatsoever.

3. In directing the court reporter not to report certain remarks of the Court made during the trial.

4. Misconduct of the Court which prevented appellants from having a fair trial.

POINT I RAISED BY APPELLANTS.

The Court Did Not Exclude Any Evidence Which Tended in Any Way to Establish the Fact That Appellee, Wilbert C. Hamilton, Was a Partner of Brunson & Bunch.

If, in fact, the Court excluded any evidence which properly tended to show that appellee, Wilbert C. Hamilton, was a partner of the partnership of Brunson & Bunch, whether it was evidence tending to show fraudulent misrepresentations and a general fraudulent plan and scheme, or otherwise, the same does not appear in the transcript of the record offered to this Honorable Court by appellants, and further, counsel for appellants have not pointed out such a ruling by the Court in their brief. All that is pointed out, either in appellants' brief or the transcript of record, is a portion of a colloquy between counsel and the Court.

The Court said at one point, "I am not going to make any order at the present time." (See quotation from App. Op. Br. p. 9.)

The Court again said:

> "Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other reasons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have." (See quotation from App. Op. Br. on bottom of p. 12, continuing on p. 13.)

The above quotations, it seems to us, is the nearest the Court came to ruling upon the question of evidence in so far as the record before this Honorable Court is concerned and this, standing by itself, in the absence of the

entire record, fails to disclose a definite and final ruling excluding or refusing to receive any evidence.

On the contrary, in the last quotation above, the Court stated why it thought the evidence which the appellants were then trying to offer was improper, but regardless of the Court's opinion, it allowed appellants to offer the testimony of their best witness. Certainly this is not a refusal to receive evidence but a direct statement to counsel to offer their best evidence.

Obviously this Honorable Court is left in the dark as to the nature of the evidence sought to be offered on behalf of appellants except as to what may be surmised from the remarks of the trial court, but at best, we submit that this is a very awkward and improper way of attempting to prove a partnership.

The findings of fact, conclusions of law and judgment are before the Court. This Honorable Court in the case of *Rickard v. Thompson,* 72 F. 2d 807 at 809, said:

> "By most of the assignments of error it is contended that the court erred in the findings of fact, the claim being made that there was no evidence to sustain some of them and that others are contrary to the evidence, but as appellant has failed to include in the record any of the evidence taken at the trial and the only statement as to evidence is contained in the opinion of the court, which amply sustains the findings and decrees, this court must presume that those findings are correct. Vineyard Land & Stock Co. v. Twin Falls Oakley L. & W. Co. (C. C. A. 9), 245 F. 30; Woods-Faulkner & Co. v. Michelson (C. C. A. 8), 63 F. (2d) 569; Karn v. Andresen (C. C. A. 8), 60 F. (2d) 427."

Neither will the existence of facts on which the record is silent be presumed for the purposes of reversal.

Collins v. Riley, 104 U. S. 322;

Thompson v. Ferry, 21 S. Ct. 453, 180 U. S. 484;

Avery v. Vernon, et al., 40 F. 2d 796.

We readily admit, in the absence of a full and complete transcript of the record for this Honorable Court to follow, that the trial court did, from time to time during the trial, make certain rulings and sustain certain objections, and overruled certain other objections to questions asked various witnesses by various counsel, but we respectfully submit that this Honorable Court or no other Court could properly determine whether such rulings of the Court were improper unless it had the benefit of the entire record showing the questions to which there may have been objections, the nature and extent of the objections, the subject matter under discussion and possibly the answers to the questions asked. Indeed, the Court should have the benefit of a full and complete transcript of the entire proceeding to properly determine such questions. In the absence of such a record, the Court must conclude that the procedure followed during the course of the trial was in all respects proper.

Counsel, in their opening brief at page 10, cite the case of *Seymour v. Oelrichs*, 115 Cal. 782 at 795-7. We have endeavored to find this case reported in 115 Cal. and do not find such a reported case nor do we find such a numbered page in this volume.

We fail to see how the decision of *Bedell v. Morris*, 63 Cal. App. 453, is of any benefit to appellants, unless they show by the record a similar factual situation.

POINT II RAISED BY APPELLANTS.

The Court Did Not Err in Finding That Appellee, Wilbert C. Hamilton, Is Not Indebted to Petitioning Creditors or Any of Them in Any Amount Whatsoever.

1. Before the Court could determine whether or not Wilbert C. Hamilton was insolvent, it was necessary for the Court to determine from the evidence what debts, if any, he owed.

2. Had the Court determined that Wilbert C. Hamilton was a member of the partnership of Brunson & Bunch, it would still have been necessary for the Court to determine the amount of indebtedness which Hamilton owed before the Court could properly determine the question of insolvency.

See:

Tom v. Sampsell, 131 F. 2d 779.

3. And further, before the trial court could have adjudicated Wilbert C. Hamilton as a bankrupt, either as a partner or personally, it would have been necessary for the Court to find not only that Hamilton was indebted to the petitioning creditors as a partner or personally, but also that the claims of said petitioning creditors were fixed as to liability and liquidated as to amount in order to properly qualify them as petitioning creditors in an involuntary bankruptcy proceeding as required by Section 59-b of the Bankruptcy Act, as amended.

In re Garrett & Co., 134 F. 2d 227;

In re Central Ill. Oil & Refining Co., 133 F. 2d 657.

Counsel for appellants, in their brief, pages 10 and 11, say:

"Throughout the entire trial, the court repeatedly reiterated this position, and continually ruled against

the admission of evidence not specifically directed to the said two points, insolvency and partnership.

"On numerous occasions when appellants attempted to present evidence bearing upon the matters covered by said findings, the respondent objected thereto and in each instance the court sustained objections and refused to admit such evidence."

Obviously there is nothing in the record to support the last quoted statement of counsel. If it is true, as appellants contend, that on numerous occasions attempts were made to present evidence bearing upon the matters covered by the findings and objections were sustained thereto and appellants were refused the right to offer such evidence, this Court is left in the dark as to the nature of the questions asked, the nature of the evidence offered, and the nature and extent of the objections made. We do not believe this Court will assume the existence of facts on which the record before it is silent for the purposes of supporting a reversal.

The question of whether or not these petitioning creditors had claims fixed as to liability and liquidated as to amount was one of the important issues raised by the pleadings in both the petition and answer.

Further answering appellants' contentions under this point, it makes little difference what the trial court may have said the issues in the trial were at some point or another during the trial, since the trial court later recognized that there were other issues raised by the pleadings before the trial was actually concluded, and counsel had the right and privilege to present evidence upon all the

issues in the case, and had appellants given this Honorable Court the benefit of a full and complete transcript of the trial, such a transcript would have disclosed the fact that counsel had an opportunity to offer evidence upon all issues raised by the pleadings.

The Court, early in the trial, indicated that the case should and would be tried in three days but the fact remains that six days were consumed in the trial and the Court actually continued the case from July 1 to September 7 in order that all evidence upon the issues joined by the pleadings might be received.

It is not uncommon for a trial court, at the beginning of a trial, and before it is too familiar with all the issues of the case, to make certain statements either as to law or evidence from which it later finds it wishes to recede, and it is true that the trial court did recede from its position in the number of days that were to be allocated to the trial of the case and continued the case to September 7 for further hearing, and had counsel favored this Honorable Court with a complete transcript, other changes in the course of the proceedings would have been noted. As a matter of fact, counsel say in appellants' opening brief, on page 25:

> "Appellants on several occasions attempted to point this matter out to the trial judge, but were repeatedly overruled, and it was only after appellants' counsel's insistence to an extreme degree that the trial judge acceded in part to appellants' theory of presenting the case."

POINT III RAISED BY APPELLANTS.

The Court Did Not Direct the Court Reporter Not to Report Certain Remarks of the Court as Complained of by Appellants During the Trial.

Counsel for appellants contend that the remarks complained of made by the Court and which were not taken down by the Court Reporter were made during the trial.

The colloquy here complained of took place after the Court had taken the noon adjournment. Counsel in their opening brief, page 15, say that it happened at about the hour of 12:40 P. M. as shown by the affidavits of Glenn A. Lane, G. N. Williams, H. H. Slate, and George B. McClyman. Mr. Lane says in his affidavit:

> "The said Honorable Leon R. Yankwich stated that the court was then adjourning for the usual noon recess; that counsel should prepare themselves for night sessions to try said case, because the Court was scheduled to leave for San Francisco, California, to try other matters," [Tr. of Record p. 98].

On page 25 of appellants' opening brief, it is admitted that the Court was not in session at the time of the colloquy, wherein it is said:

> "Second, the action of the trial court in arbitrarily limiting the reporter in recording the *actual happenings in open court* shows an attitude on the part of the Court to run the Court for the judge's own purposes and not for the benefit of litigants." (Emphasis ours.)

This, we believe, supports our contention that the colloquy took place after the noon adjournment of Court.

Assuming that the Court did tell counsel they would be required to call Mrs. Hamilton as the next witness, the

fact remains that Mrs. Hamilton was not called as the next witness and was not called to testify at all, as shown by her affidavit. [Tr. of Record pp. 113 and 114.] Misconduct of the trial court cannot be determined from isolated statements such as here complained of but rather can only properly be determined from a complete transcript of the record of proceedings had before the trial court.

POINT IV RAISED BY APPELLANTS.

Appellants Were Not Prevented From Having a Fair Trial of the Issues Framed by the Pleadings.

Appellants again contend that they were prevented from offering certain evidence which was material to the issues framed by the pleadings. If this Honorable Court had before it the questions asked or offer of proof, if any, made to which objections were sustained, then this Honorable Court would be in a position to determine whether or not such evidence should have been received. In the absence of such record in the transcript, such contentions merit no consideration.

Under this point, counsel say on page 24 of their opening brief:

> "As pointed out in appellants' Point I herein, the existence of a partnership in which respondent was a partner could be shown only by establishing the fact that respondent was an ostensible partner."

The Court did not prevent appellants from showing that appellee was an ostensible partner, but on the other hand the Court commented at length even as shown in the limited transcript now before this Court [pp. 135-136-137] upon the very broad nature of the proof to be offered tending to establish a partnership.

Appellee never at any time held himself out to be a partner of Brunson & Bunch and counsel have not cited one bit of evidence tending in any degree to show that he did, and the trial court did not restrict appellants in the introduction of testimony but, on the contrary, indicated that the proof to be offered was of a very broad nature. Counsel's rambling statements are of little force when wholly unsupported by the record which they offer this Honorable Court; and we respectfully submit that this Court is in no position to determine the question of the fairness or unfairness of the trial had by appellants in the absence of a complete record of the proceeding.

We, therefore, respectfully submit that the judgment of the trial court should be affirmed.

Sylvan Y. Allen,
J. D. Willard,
Ernest R. Utley,
By Ernest R. Utley,
Attorneys for Appellee.